

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
Implementation of Section 224 of the Act;)	WC Docket No. 07-245
A National Broadband Plan for Our Future)	
)	GN Docket No. 09-51
)	

COMMENTS OF TIME WARNER CABLE INC.

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EXECUTIVE SUMMARY

TWC fully supports the Commission's decision to abandon its initial proposal to impose higher pole attachment rates on broadband services, and instead to embrace the Broadband Plan's core recommendations to implement a pole attachment rate structure that is as low and uniform as possible for all providers. Eliminating the existing punitive rate structure, which deters investment, and lowering the costs of access to critical infrastructure will spur the deployment of broadband facilities and further the national goal of universal broadband service. In addition to removing artificial marketplace distortions, a low and uniform rate will also reduce – if not eliminate – the endless cycle of litigation the current structure has unleashed and reduce the indirect costs and administrative difficulties inherent in the current scheme.

The Commission's proposal to accomplish these important objectives by removing capital costs from the Telecom Rate is entirely appropriate as the Commission's formulas currently overcompensate utilities. It is also well within the bounds of permissible statutory construction of the ambiguous term "costs." The Commission's proposal, which guarantees utilities a rate that allows the recovery of the fully-allocated costs of attachment, also satisfies the constitutional requirement of "just compensation."

Rather than leave the existing Telecom Rate in place as the "upper bound" of its zone of reasonableness, however, the Commission should jettison that expression of the rate entirely. Instead, the Commission should set the Cable Rate as the upper bound of the zone of reasonableness for telecommunications services attachments. This approach harmonizes subsection (e) of Section 224, which sets forth elements to include within the Telecom Rate, with subsections (b) and (d), which together require that all attachment rates must be "just and

reasonable” and establish the zone of reasonableness for that standard. This approach is further supported by the statute’s text, structure and history.

TWC also supports the Commission’s effort to adopt the recommendations of the Broadband Plan to reduce the costs and delays associated with the permitting and make-ready processes. But TWC believes that the Commission’s proposed multi-stage timetable is ill-advised and would prove counterproductive in practice. While the Commission’s proposal may alleviate the most egregious and troubling utility delays, it would establish baselines based on outlier cases that are out of step with the far shorter timelines that TWC currently enjoys for typical permit applications. The Commission’s new baselines would inject new and devastating delays into the usual permitting process for TWC and, in effect, further slow its construction of facilities to serve commercial customers and anchor institutions. If the Commission decides to set permitting and make-ready timetables, it should adopt far shorter periods in line with standard contract requirements and TWC’s current experience.

The Commission should take other steps to reduce costs and delays inherent in the make-ready process as well. In this regard, the Commission should adopt rules that allow wider use of outside contractors during the make-ready phase. It should likewise prevent non-serious safety violations uncovered during the make-ready process from derailing construction and allow communications workers to follow the NESC work rules, rather than restrict these workers to the communications and safety space. And the Commission should reaffirm that cable operators are not required to give notice or obtain advance permission before overlashing a host attachment.

TWC also supports the Commission’s effort to strengthen its enforcement authority by allowing attachers to recover compensatory damages for denials of access and unreasonable rates, terms and conditions consistent with applicable statutes of limitations. Utilities currently have

little incentive to comply with the Commission's rules, and often ignore longstanding precedents. The threat of damages for such abuses will not only encourage utilities to comply with the Commission's rules before a complaint is filed, but it will also allow attachers to be made whole for the injuries that utilities' unreasonable actions cause.

At the same time that the Commission proposes to strengthen its enforcement procedures in important respects, however, it proposes to weaken an important tool in its enforcement toolbox – the “sign and sue” rule. The Commission's proposed modifications to this rule proceed from the incorrect assumption that attachers and utilities bargain over reasonable terms on equal footing; they do not. And in practice, the Commission's modifications would prove unworkable, further complicate and prolong pole attachment negotiations, spur more litigation over terms that may never be unreasonably enforced, and ultimately subvert the Commission's ability to fulfill its statutory mandate to eradicate unjust and unreasonable pole attachment terms.

The Commission should further decline to allow harsher penalties for unauthorized attachments. The record in this proceeding demonstrates that utilities' claims of massive numbers of unauthorized attachments are baseless. The real problem in the field is not the amount of penalty sufficient to deter cable operators from making unauthorized attachments, but the inappropriate ways in which utilities identify “unauthorized” attachments in the first place. If the Commission adopts more severe penalties, it should require utilities and attachers to establish a common attachment baseline before any penalties may be imposed.

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EXHIBITS

Declaration of Bruce A. Morrissey
Declaration of Robert Shugarman

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Time Warner Cable Inc. (“TWC”) respectfully submits these Comments in response to the Commission’s May 20, 2010, *Further Notice of Proposed Rulemaking* in WC Docket No. 07-245, GN Docket No. 09-51 (“FNPRM”), published in the Federal Register on July 15, 2010. *See* 75 Fed. Reg. 41,338 (July 15, 2010).

DISCUSSION

I. THE COMMISSION’S PROPOSED RATE STRUCTURE IS SOUND, LAWFUL, AND WILL PROMOTE BROADBAND DEPLOYMENT.

A. A Low And Uniform Rate Structure Will Advance The Core Objective Of Promoting Broadband Deployment.

TWC strongly supports the Commission’s decision to abandon its earlier proposal to impose a broadband tax on innovative services, 1/ and instead implement a low and uniform rate for all pole attachments in furtherance of the Broadband Plan’s key recommendation to “establish rental rates for pole attachments that are as low and close to uniform as possible . . . to

1/ *See* FNPRM ¶ 118.

promote broadband deployment.” 2/ As TWC and others pointed out in earlier rounds of this proceeding, lowering the input costs of essential pole facilities is critical to achieving the longstanding national objective of universal broadband deployment. 3/ Adopting a rate structure that is as low and uniform as possible will eliminate marketplace distortions, foster the deployment of innovative service offerings, reduce distracting and punitive litigation, and promote administrative efficiency. TWC urges the Commission to adopt a rate structure that results in a Telecom Rate that is as uniform with the Cable Rate as possible.

The Commission’s existing rate structure, which produces wildly divergent rates for cable, Internet, and unclassified services, on the one hand, and telecommunications services, on the other, is irrational, unfair, and has proven counterproductive in practice. The different rates are for use of the very same resource: space on a pole. 4/ And the record demonstrates that these various communications services, which travel over the same attached fiber optic wires, do not impose any different burden on the pole or costs on the pole owner. 5/ As such, there is simply no logical reason that the rate paid to attach a wire used for telecommunications services should be three to five times more than the rate applied to other communications services – a difference that amounts to hundreds of millions of dollars a year for cable operators and ultimately their subscribers. 6/ This profound gap is particularly inappropriate given that cable operators run integrated voice, video and data networks. For their part, the utilities have failed to come

2/ See *Omnibus Broadband Plan Initiative*, Federal Communications Commission, *Connecting America: The National Broadband Plan* 109 (2010) (“Broadband Plan”).

3/ See, e.g., Comments of Time Warner Cable (“TWC Comments”) at 3-11.

4/ Broadband Plan at 110.

5/ TWC Comments 39-40; Broadband Plan at 110.

6/ See *id.*; see Comments of National Cable & Telecommunications Association (“NCTA Comments”), Pelcovits Decl. ¶ 22.

forward with any economic justification for higher pole attachment rates for broadband services. 7/

The Commission's existing rate surcharge on telecommunications services distorts the market for communications services and negatively impacts providers' broadband deployment decisions. This is not a new problem. The Commission has long known that the existing Telecom Rate deters deployment of innovative services. In ruling that the Cable Rate applied to Internet service provided by cable operators, the Commission feared that "specifying a higher rate *might deter an operator from providing non-traditional services.*" 8/ It therefore concluded that any rate above the Cable Rate "would not serve the public interest." 9/

The states that have exercised their "reverse preemption" option to regulate pole attachments have also recognized that the Commission's existing Telecom Rate stymies innovative services. 10/ Many of these states apply a uniform rate based on the Commission's Cable Rate to all attachments. 11/ These states have recognized that a higher rate would deter

7/ See Reply Comments of Time Warner Cable ("TWC Reply Comments") at 8-9.

8/ See *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules & Policies Governing Pole Attachments*, 13 F.C.C.R. 6777, 6794, ¶32 (1998) ("1998 Report & Order").

9/ See *id.*; see also *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 F.C.C.R. 7099, 7103, ¶ 18 (1991)

10/ Twenty-one states have displaced FCC jurisdiction over pole attachments with their own regulations. See 47 U.S.C. § 224(c); *States That Have Certified That They Regulate Pole Attachments*, Public Notice, WC Docket No. 10-101, 2010 WL 202063 (May 19, 2010); see TWC Comments at 35-38.

11/ See, e.g., Utah Adm. Code R. § 746-345 (2007); *Petition of the United Illuminating Co. for a Declaratory Ruling Regarding Availability of Cable Tariff Rate for Pole Attachments by Cable Sys. Providing Telecomm. Servs. & Internet Access*, Docket No. 05-06-01 (Conn. D.P.U.C., rel. Dec. 14, 2005); *Consideration of Rules Governing Joint Use of Util. Facilities & Amending Joint-Use Regulations Adopted Under 3 AAC 52.900 – 3*, 2002 WL 32830485 (Alaska R.C., Oct. 2, 2002); *Proceeding on Motion of the Commission as to New York State Elec. & Gas Corp.'s Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments & to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Cos.*, 2002 N.Y. PUC LEXIS 14, (rel. January 15, 2002) ("NY Proceeding"); *Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Serv.*, D. 98-10-058, 1998 WL 1109255 (Cal. PUC rel. Oct. 22, 1998); see also Comments of the Oregon Public Utility Commission at 3 ("All attachers in Oregon, including broadband Internet access providers, are subject to the same pole attachment rate formula" based on the Cable Rate).

facilities-based competition in the broadband market. 12/ And the record in this proceeding, and the record on which the Broadband Plan is based, overwhelmingly demonstrates that, in practice, the Telecom Rate has had just this effect. 13/

In addition to fostering broadband deployment by removing artificial marketplace distortions, a uniform rate structure will carry the salutary benefit of reducing significant indirect costs caused by the existing differences between the Telecom and Cable Rates. The existing rate differences have produced a virtually endless torrent of litigation by utilities seeking to impose the Telecom Rate on any and every innovative service that cable operators bring to market. 14/ The Broadband Plan confirms that “[t]he rate structure is so arcane that, since the 1996 amendments to Section 224, there has been near-constant litigation about the applicability of ‘cable’ or ‘telecommunications’ rates to broadband, voice over Internet protocol and wireless services.” 15/ These disputes are costly, distracting, and deter the roll-out of new services. And as cable operators deploy new offerings to commercial customers and anchor institutions in competition with incumbent providers, utilities will continue to litigate over the classification of such services absent a uniform rate structure that removes the financial incentive to do so.

12/ See, e.g., *NY Proceeding*, 2002 N.Y. PUC LEXIS 14, at *4-*5 (“To allow increased pole attachment rates at this time, when competition and the number of attachers has not developed as previously contemplated, is contrary to the public interest . . . in that it would undermine efforts to encourage facilities-based competition and to attract business in New York.”); See *Competition for Local Exchange Serv.*, Decision 98-10-058, 82 C.P.U.C.2d 510, *available at* 1998 WL 1109255 (Cal. P.U.C. Oct. 26, 1998) (holding uniform rate based on cable formula would promote the incentive for facilities-based . . . competition”).

13/ See FNPRM ¶ 115; Letter from D. Brenner, Counsel to Bright House Networks, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51 & 09-137 (Feb. 16, 2010), Aff. of N. Lenoci; *see also* Broadband Plan at 110-111.

14/ See Bright House Networks Reply Comments 9-11; Comments of Ameren Servs. Co. & Virginia Elec. & Power Co. at 17; *Tampa Elec. Co. v. Bright House Networks, LLC*, No. 06-00819; *Georgia Power v. Comcast*, No. 2006-CV 116060; 2007-CV-135617.

15/ See Broadband Plan at 110.

Consistent with the recommendations of the Broadband Plan, a low and uniform rate will reduce the indirect administrative costs associated with the existing rate scheme. ^{16/} The current scheme requires a cable operator to separately track any of the poles that are used to provide “telecommunications services.” That task is incredibly complex in a cable system that is an integrated voice, video and data network, requiring sophisticated technology and countless employee hours to correlate customer services and pole routes. And the results are subject to dispute by utilities. A uniform rate would eliminate the need to waste precious resources on an exercise that diverts time and attention away from more important objectives.

B. The Existing Telecom Rate Formula Overcompensates Utilities, And It Is Permissible And Appropriate To Remove Inappropriate Costs In The Lower Bound Telecom Rate.

The current Telecom Rate subsidizes pole owners, and the Commission can and should reinterpret that formula to remove inappropriate costs in order to create a lower and more uniform rate structure for all providers. The Commission’s existing rate formulas include a number of elements that result in rates that overcompensate utilities, including capital costs, which have long been recognized as incurred by utilities without regard to the presence or needs of third-party attachers. As the expert agency with authority to interpret Section 224, the Commission has discretion to interpret the ambiguous term “cost” in subsection (e) to exclude capital costs (including taxes), and it is reasonable for it to do so. That interpretation will produce a Telecom Rate more in line with sound principles of cost causation and that advances the core objective of broadband deployment by creating a low and uniform attachment rate.

^{16/} See *id.* (explaining that “costs can also be lowered indirectly by expediting processes and decreasing the risks and complexities that companies face as they deploy broadband network infrastructure.”).

1. Capital Costs Should Be Removed From The Telecom Rate Because Utilities Incur Those Costs Regardless Of The Presence Of Third Party Attachers And The Existing Formulas Overcompensate Utilities.

The Commission's proposal to re-interpret "costs" under subsection (e) based on principles of cost causation to exclude capital costs and taxes that have been traditionally included in the Cable Rate under subsection (d) is entirely appropriate. As TWC and others have pointed out, the Commission's existing rate formulas overcompensate utilities for pole attachments, which, in effect, provide a subsidy from the cable operator to the pole owner. 17/

For example, the existing Telecom Rate significantly over-allocates common space to cable operators and other communications attachers. Utilities (and joint user telephone companies) require poles that are taller and stronger than poles needed by communications attachers in order to support their heavy facilities that take up more space and must start higher on the pole than communications facilities. Utilities and their joint users also use much more of the usable pole space than cable operators. Accordingly, it is inappropriate to allocate the common costs equally among all of the attachers; cable operators bear more than their fair share of such costs under the existing Telecom Rate. 18/ While the portion of the common space allocated to the cable operator is reduced by one-third, that merely compensates (partially) for the fact that the cable operator has far fewer rights than the pole owner or joint users. 19/

The record amply demonstrates that other cost and expense elements of the Commission's existing formulas are not consistent with cost causation principles and have effectively allowed utilities to turn their pole plant into a profit center. As AT&T pointed out, the Commission's reliance on the average cost of all poles in FERC Account 364 (Poles, Towers

17/ TWC Reply Comments at 3-7, 17-20 & Bazelon Decl. at 27.

18/ See TWC Reply Comments at 17-19.

19/ See 47 U.S.C. § 224(e); TWC Reply Comments at 19.

and Fixtures) allows utilities to recover the costs of an average pole that is more expensive than the poles to which cable operators actually attach. 20/ That is because utilities invest in many poles that are taller and more expensive than the 35-40 foot distribution poles and 25-30 foot drop poles typically relied on by cable operators. 21/ Account 364 also includes investments in appurtenances greater than the 15 percent assumed by the Commission, and that bear no conceivable relationship to communications attachments. 22/

The Commission's formulas also include buckets of expenses that have no connection to pole attachments. The Commission allows utilities to recover administrative expenses, such as executive compensation, bonuses, advertising, and a host of other expenses that are in no sense caused by cable operator attachments. 23/ Utilities are also allowed to recover a maintenance charge that is based on the full amount of FERC Account 593, which relates to maintenance of overhead lines. But, again, this account is bloated with maintenance items that do not relate to pole attachments, such as overhead conductors and devices used for electric service drops. 24/ Similarly, utilities are permitted to recover taxes related to utility operating income, which do not correlate to pole attachment income. And utilities are allowed to recover charges under the depreciation element that do not have a direct bearing on pole assets. 25/

Given that the existing rate formulas overcompensate utilities, the Commission's proposal to remove capital costs from the existing Telecom Rate is entirely warranted and consistent with principles of cost causation. 26/ Indeed, Congress recognized that cable operators are not the cost causers of capital investments in pole plant and that it would be

20/ See Comments of AT&T, MacPhee Decl. ¶¶ 37-40.

21/ See TWC Reply Comments at 21.

22/ See *id.* at 22.

23/ See *id.* at 23.

24/ See *id.* at 24.

25/ TW Telecom White Paper at 19-20; See TWC Reply Comments at 24-25.

26/ See FNPRM ¶¶ 133-137.

appropriate to exclude such costs from the Cable Rate. When it first enacted Section 224, Congress authorized the Commission to adopt a rate formula based on incremental costs because “cable television attachments cause no capital costs to the utilities.” 27/

This basic point remains true and applies with equal force to attachments used for telecommunications services. Utilities invest in poles to provide electric service; they do not construct pole lines based on the needs of third-party attachers. 28/ Cable operators and other providers only have a right to attach in “surplus” pole space. Accordingly, pole owners have the right to prevent third-parties from attaching “for reasons of lack of capacity, safety, reliability or engineering standards.” 29/ Utilities may also deny attachment when they have a “bona fide development plan” that identifies a future use for existing excess space. 30/ And cable operators cannot compel a utility to create “surplus” pole space for their use. 31/

Cable operators are also obligated to pay for any capital “make-ready” costs incurred as a result of their attachment, which leaves utilities better off following third-party attachment. 32/ Thus, if a pole must be replaced to accommodate the cable operator, it must pay all of the costs to install the new pole, remove the old pole, and transfer all of the facilities from the old pole to the new one. These costs can run as high as \$3,000 to \$5,000, or much more. Yet, even though the cable operator purchased the pole, it retains no ownership interest in it and must pay annual

27/ 123 Cong. Rec. 16,695 (daily ed. May 25, 1977); 47 U.S.C. § 224(d)(1).

28/ See TWC Comments at 27; FNPRM ¶ 135.

29/ 47 C.F.R. § 1.1403(b).

30/ See *Implementation of Local Competition Provisions in Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, 16,078, ¶ 1169 (1996) (“We will permit an electric utility to reserve space if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service.”); see also *Southern Co. v. FCC*, 293 F.3d 1338, 1348 (11th Cir. 2002) (holding “[t]he FCC guideline require[ing] a ‘bona fide development plan’ as a prerequisite to a utility’s reservation of space for its future needs is a reasonable exercise of agency discretion.”).

31/ See *Southern Co.*, 293 F.3d at 1347 (when “capacity is insufficient, there is no obligation to provide third parties with access to that particular ‘pole, duct, conduit, or right-of-way.’ ”) (quoting 47 U.S.C. § 224(f)(2)).

32/ NCTA Comments at 10 & Kravtin Rpt. ¶¶ 69-72; see also FNPRM ¶135.

rent to the utility to remain attached to it. Cable operators also are obligated to cover the costs for any relocations or rearrangements of other attachers' facilities that are required to accommodate their attachment. 33/

2. *The Commission May Permissibly Interpret “Cost” To Exclude Pole Plant Capital Costs.*

Not only is the Commission's proposal to remove capital costs from the Telecom Rate entirely appropriate, it is also well within the permissible bounds of construction of an ambiguous statutory provision. Congress vested the Commission with the responsibility to reasonably interpret statutory ambiguities – that is, to fill statutory gaps with interpretations that promote sensible policy objectives and that are not prohibited by the statute's plain language. 34/ Giving effect to Section 224's mandate to ensure “just and reasonable” rates for both cable and telecommunications attachments fundamentally requires the Commission to exercise that important responsibility. As the Commission recognizes, subsection (e), which sets forth certain requirements for the Telecom Rate, specifies how the costs of usable and unusable space on a pole are to be distributed between the owner and attacher. But unlike subsection (d), subsection (e) does not define what “costs” are to be considered. 35/ The Commission has “broad methodological leeway” to interpret that notoriously ambiguous, but critical term. 36/

To be clear, removing capital costs from the Telecom Rate is not forbidden by the unambiguous text of Section 224. 37/ Far from it. In subsection (d) of Section 224, Congress undertook to define the costs that must be included in the maximum expression of the Cable Rate:

33/ See 47 U.S.C. § 224(i).

34/ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984); see also *Barnhart v. Walton*, 535 U.S. 212, 218 (2002); *Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005).

35/ See 47 U.S.C. § 224(e)(2)-(3); FNPRM ¶ 130.

36/ See *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 423 (1999) (Breyer, J., concurring in part and dissenting in part); *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 500-501 (2002); FNPRM ¶ 131.

37/ See *Barnhart*, 535 U.S. at 218.

“actual capital costs of the utility attributable to the entire pole.” 38/ Yet, Congress declined to include the same “cost” requirements in subsection (e) for the Telecom Rate, instead referring simply to the cost of “providing space on a pole.” 39/ Under familiar principles of statutory construction, that distinction is meaningful and signifies that Congress intended to afford the Commission discretion to define costs under subsection (e) different from costs under subsection (d). For “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” 40/ That “presumption is much stronger when, as here, the comparison is between two subsections of the same section of a statute.” 41/

Looking to cost causation principles for guidance in interpreting “cost” in subsection (e) is also consistent with Congressional intent reflected in other parts of Section 224. In a different subsection of Section 224, Congress mandated that the entity that causes certain costs is responsible for them. Thus, the entity that imposes rearrangement and relocation costs on other attachers must pay for those costs. 42/ Similarly, an attacher that adds to or modifies its attachment at the same time the pole owner modifies a pole must bear its proportionate share of the costs incurred by the pole owner in making the pole accessible. 43/ And Congress required that a utility that provides communications services must impute to itself an equal amount of the pole attachment rate for which it would be responsible. 44/ All of these requirements assign costs to the entity that caused them – just as the Commission proposes to do with pole plant capital costs under the Telecom Rate.

38/ See 47 U.S.C. § 224(d)(1).

39/ See *id.* § 224(e)(2).

40/ *Brown v. Gardner*, 513 U.S. 115, 120 (1994).

41/ *Chesnut v. Montgomery*, 307 F.3d 698, 702 (8th Cir. 2002).

42/ See 47 U.S.C. § 224(i).

43/ See *id.* § 224(h).

44/ See *id.* § 224(g).

While the Commission's existing Telecom Rate produces rates above the Cable Rate, the removal of capital costs to lower the Telecom Rate to a level beneath the Cable Rate is also consistent with the legislative objectives of the 1996 amendments to Section 224. The rate applicable to telecommunications providers was not anticipated to reach the punitive levels that it has under the existing Telecom Rate because, when Congress adopted the elements set forth in subsection (e), the expectation was that the competition spurred by the 1996 Telecommunications Act would lead to many new parties attaching to poles. ^{45/} If competition had flourished in that manner, the Commission's implementation of the existing Telecom Rate may have made economic sense and produced a "just and reasonable" rate. ^{46/} But competition did not develop in the ways that Congress or the Commission anticipated, and the result has been a Telecom Rate that is excessive, distorts the marketplace for innovative communications, and deters broadband deployment – in other words, a rate that undermines, rather than advances, the goals of the 1996 Act. The Commission has the authority to reduce the Telecom Rate by removing capital costs, and it should do so without delay.

C. Consistent With The Text, Structure And History Of Section 224, The Commission Should Establish The Existing Cable Rate As The Upper Bound Of The Rate Structure For Telecommunications Attachments.

TWC agrees with the Commission that it is essential to create Cable and Telecom Rates that are as low and uniform as possible. TWC also believes that whatever rate structure the Commission adopts should result in a Telecom Rate that is as close to the Cable Rate as can be

^{45/} See Pub. L. No. 104-104, 110 Stat. 56, 56 (1996) (stating Act is intended "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"); see also *Destek Group, Inc. v. State of New Hampshire Pub. Utils. Comm'n*, 318 F.3d 32, 37 (1st Cir. 2003) ("A principal purpose of the Telecommunications Act is to increase competition in the market for local telephone services."); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1236 (10th Cir. 1999) (explaining "the broad purpose of the Telecommunications Act of 1996 is to foster increased competition in the telecommunications industry").

^{46/} See 47 U.S.C. § 224(e).

achieved consistent with the statute. While the Commission's rate structure proposal is directed at achieving this key recommendation of the Broadband Plan, however, the Commission should not leave the existing Telecom Rate formula intact as the upper bound of its proposed rate structure. Given that the Commission recognizes that the existing subsection (e) formula overcompensates utilities, there is a more straightforward path to achieve the objective of a low and uniform rate that is supported by the statutory framework of Section 224: The Commission should harmonize the different parts of Section 224 by setting the existing Cable Rate as the upper bound of its rate structure for telecommunications services attachments. 47/

Section 224(b)(1) mandates that the Commission "shall regulate the rates, terms and conditions of pole attachments to provide that such rates, terms and conditions are just and reasonable." 48/ The critical term "just and reasonable" is defined "[f]or purposes of subsection (b) of this section" under subsection (d)(1) as a pole attachment rate that is set "between the incremental costs of the utility and the cable operator's share of the utility's fully allocated costs" of attachment. 49/ In other words, a "just and reasonable" rate falls within a zone that "assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole." 50/

47/ See FNPRM ¶ 141.

48/ See 47 U.S.C. § 224(b)(1).

49/ See *Amendment of Rules & Policies Governing the Attachment of Cable Television Hardware to Util. Poles*, 2 F.C.C.R. 4387, 4388, ¶ 4 (1987) ("1987 Report & Order"); see also *id.* at 4397, ¶ 71 ("A review of the Senate Report reveals that the standard permits the contracting parties, or the Commission, to determine a CATV pole attachment rate somewhere between avoidable costs and fully allocated costs."); see also S. Rep. No. 95-580, Communications Act Amendments of 1978, P.L. 95-234, 92 Stat. 33, 97th Cong., 2d Sess., at 19, *reprinted in* 1978 U.S.C.A.A.N. 109 (noting that Section 224's rate-setting formula "describes a range of permissible rates between 'additional costs' and a proportionate share of the 'operating expenses and actual capital costs' of the utility pole").

50/ 47 U.S.C. § 224(d)(1).

Section 224's statutory imperative of "just and reasonable" rates applies to "any" attachment made by cable and telecommunications providers to a pole regulated under Section 224. ^{51/} As the Commission recognizes, the "just and reasonable" requirement therefore applies to the rates set for telecommunications and other, unclassified services, as well as for cable service. ^{52/} The Supreme Court confirmed this straightforward interpretation of the statute in *Gulf Power* by holding that the rate formulas for cable and telecommunications attachments contained in subsections (d) and (e) are "subsets of – but not limitations upon" the mandates contained in subsections (a) and (b) that rates for all statutory attachments be "just and reasonable." ^{53/}

This reading of Section 224 is further confirmed by the statute's history. When Congress adopted Section 224, it intended subsection (d) to "provide the Commission with a sense of congressional intent as to the meaning of the term 'just and reasonable [in subsection (b)(1)].'" ^{54/} And when Congress amended Section 224 in 1996 to include a separate telecommunications rate it did not exclude that rate from the "just and reasonable" requirement of subsection (b)(1). Instead, Congress reaffirmed that any rate under subsection (e) must be "just, reasonable, and nondiscriminatory." ^{55/}

The text, structure and history of Section 224 therefore make clear the upper bound for any pole attachment rate, including the Telecom Rate, cannot exceed the upper limit of the zone of reasonableness established under subsection (d)(1). The existing Cable Rate, which allows

^{51/} *Id.* § 224(a)(4).

^{52/} See FNPRM ¶ 129 ("[S]ection 224(b) imposes an overarching duty that the Commission ensure that rates are 'just and reasonable.'").

^{53/} 534 U.S. at 336.

^{54/} Sen. Rep. 95-580, 1997 U.S.C.A.A.N. at 129. Subsection (d) was to provide an interim approach to rate setting, but that limitation was deleted from the law. See Communications Act Amendments of 1982, P.L. 97-259, 96 Stat. 1087, § 106.

^{55/} 47 U.S.C. § 224(e)(1).

utilities to recover the fully allocated costs of pole attachments, is set at that upper limit. 56/ Thus, instead of allowing the existing Telecom Rate formula to continue to set the upper bound for telecommunications attachments, the Commission should set the upper bound at the existing Cable Rate, with the lower bound set at the modified Telecom Rate formula that the Commission now proposes. This approach is faithful to principles of sound statutory construction and ensures an attachment rate that is as low and uniform as possible consistent with Section 224, as recommended by the Broadband Plan. 57/

D. Permitting Utilities To Recover The Cable Rate For Attachments Used For Telecommunications Services Does Not Trigger Any Constitutional Taking Because That Rate Is Fully Compensatory.

There can be little question that the Commission's proposed rate structure adequately compensates utilities and therefore complies with the Takings Clause of the federal Constitution. *See* U.S. Const. Amend. V. Under the Commission's proposal, utilities would receive the higher of the existing subsection (d) Cable Rate or the revised subsection (e) Telecom Rate. 58/ Thus, utilities would, at a minimum, receive pole attachment rent calculated under the Cable Rate.

The Cable Rate is set at the upper end of the zone of reasonableness by allowing utilities to recover their fully allocated costs of attachment. The fully allocated cost approach takes account of the annual costs of owning and maintaining the pole, regardless of the presence of any licensee's attachment and allocates a portion of that cost to the licensee. 59/ The Commission has repeatedly affirmed that, because the Cable Rate provides for recovery of fully allocated

56/ *See* 1987 Report & Order, 2 F.C.C.R. 4387; *Texas Cablevision v. Southwestern Elec. Power Co.*, Mimeo No. 2747 (Feb. 26, 1985); *Group W Cable, Inc. v. Interstate Power Co.*, Mimeo No. 3118 (Mar. 27, 1984); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 3 (1978).

57/ *See* Broadband Plan at 109.

58/ *See* FNPRM ¶ 141 (“[U]nder this proposal, utilities would calculate the low-end telecom rate and the rate yielded by the current cable formula, and charge whichever is higher.”).

59/ *See* 1987 Report & Order, 2 F.C.C.R. 4388, ¶ 5.

costs, it adequately compensates utilities for providing attachments. ^{60/} In fact, as TWC and others have emphasized in this proceeding, the Cable Rate actually *over*compensates utilities for providing attachments, in part due to the separate recovery of make-ready charges. ^{61/}

The United States Supreme Court has also held that the Cable Rate is fully compensatory for constitutional purposes. ^{62/} In *FCC v. Florida Power Corp.*, the Court held that it could not even “seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory.” ^{63/} Accordingly, the Commission’s proposal provides utilities with “just compensation” under the Takings Clause.

II. THE COMMISSION SHOULD MANDATE MORE EFFICIENT PERMIT AND MAKE-READY PROCESSES TO FACILITATE BROADBAND DEPLOYMENT.

The Commission correctly recognizes that costly delay in accessing infrastructure stymies deployment of broadband facilities. ^{64/} But while TWC generally supports the Commission’s effort to curb utility delays and abuses of permit and make-ready processes consistent with the recommendations of the Broadband Plan, ^{65/} its proposed five-stage timeline would not serve the critical objective of eliminating “delays in the deployment of broadband to

^{60/} See, e.g., *Amendment of Commission’s Rules & Policies Governing Pole Attachments*, 16 F.C.C.R. 12,103, 12,115, ¶ 17 (2001) (“We have been presented with no persuasive evidence that utility owners do not recover a just and reasonable compensation for pole attachments from the use of the Cable Formula.”); see *id.* (“The application of the well-established Cable Formula . . . is consistent with establishing a just, reasonable, and nondiscriminatory *maximum* pole attachment rate as envisioned by Congress . . . to compensate the pole owner for *its actual costs associated with the amount of space used by an attacher.*”) (emphasis added); see also *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585, ¶ 15 (1978).

^{61/} See, e.g., TWC Reply Comments at 1-9; Comments of AT&T at 18-21 & McPhee Decl. ¶¶ 31-46; NCTA Comments at 10.

^{62/} See *FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987); see also *Alabama Cable Telecomm. Ass’n v. Alabama Power Co.*, 16 F.C.C.R. 12,209 (2001); FNPRM ¶ 141 (“[T]he cable rate formula has been upheld by the courts as just, reasonable, and fully compensatory.”).

^{63/} *Id.* at 254.

^{64/} See FNPRM at ¶ 26.

^{65/} See Broadband Plan at 111 (“The FCC should establish a federal timeline that covers each step of the pole attachment process, from application to issuance of the final permit.”).

communities and anchor institutions.” 66/ Instead of creating a more efficient process, the Commission’s proposal would perversely create new baselines that are out-of-step with current practices and likely would further slow the deployment of facilities.

Under the Commission’s proposal, a utility would have a total of 105 to 149 days to complete the make-ready process. 67/ But, under the Commission’s existing rules, a pole owner has 45 days to grant access to a pole. 68/ While contracting parties are free to negotiate additional time for any required make-ready, the reality is that most utilities, pursuant to private contract terms or course of performance, allow attachment and complete necessary make-ready in far less time than the Commission proposes here. Thus, while the Commission’s proposed timeline may address the most egregious delays evidenced in the record, it inappropriately supports a longer process for run-of-the-mill attachments that can be installed much more quickly. As a result, the Commission’s proposed timetable would inappropriately encourage utilities to take more time than is currently necessary to process applications and provide access to poles. The result would be devastating and would undermine the goals of the Broadband Plan.

Instead of adopting its proposed five-stage timeline, and exceptions thereto, the Commission should provide for a more abbreviated timeline for the typical cases that comprise the bulk of the applications that cable operators submit and are routinely processed each year. Within these parameters, the Commission can also provide flexibility for attachers and utilities to negotiate appropriate timeframes for outlier cases that involve complex issues or where coordination among attaching parties is problematic. These types of cases are likely to delay

66/ *See id.*

67/ *See* FNPRM at ¶ 33.

68/ *See* 47 C.F.R. § 1.1403(b) (“If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day.”).

installation of attachments irrespective of any timeline imposed, and should be the exception, rather than the baseline for a standard permitting timeline.

A. The Commission's Proposal Would Inject New Delays Into The Permitting Process Because The Process Can, Should, And Typically Does Take Far Less Time Than Its Timetables Allow.

The Commission's proposal would sanction delays that currently do not exist in most cases. In the majority of cases, TWC's engineering and operational teams are able to work with their counterparts at the utility to ensure that simple attachment applications are processed quickly and make-ready work is completed promptly. ^{69/} In TWC's experience, poles are made ready for attachment within an average timeframe of 52 days. ^{70/} Even in cases where the utility has to coordinate action among multiple parties with facilities on a pole or where a pole must be replaced, poles are typically ready to accommodate a new attachment well within 90 days. ^{71/}

The realities of the communications marketplace make timely and efficient construction timelines imperative. To compete with incumbent providers that offer value-added services, for example, TWC offers business-class services with a 60-day installation commitment. Given these usual operational parameters and the competitive pressures on TWC, a five-stage, 105/149-day schedule would be a significant step backwards. It would inject new and harmful delays into the permitting process that TWC does not currently generally suffer by giving utilities far more time than is currently necessary to process routine applications. Consequently, TWC would not be able to construct facilities at the pace that it currently does. ^{72/} It would take TWC more time – not less – to provide service to key commercial customers and anchor institutions. ^{73/}

^{69/} Morrissey Decl. ¶ 7.

^{70/} Shugarman Decl. ¶ 9; Morrissey Decl. ¶ 5.

^{71/} Shugarman Decl. ¶ 9; Morrissey Decl. ¶ 5.

^{72/} Shugarman Decl. ¶ 6; Morrissey Decl. ¶ 6.

^{73/} Shugarman Decl. ¶¶ 6 & 9; Morrissey Decl. ¶¶ 6-7.

Moreover, most of the newer standard form contracts that TWC receives from pole owners already provide far shorter permitting and make-ready deadlines than the Commission's proposal. ^{74/} The parties' informal course of performance has also led to a much shorter timeline than the Commission's. ^{75/} If the Commission adopts a 105/149-day timetable, that timetable would likely become the new default baseline used by all pole owners and would be integrated into new contracts with cable operators. The new and longer timeline also would be integrated into many existing contracts to the extent that changes in the law are incorporated by reference. Pole owners that agree to shorter make-ready timelines would have less incentive to abide by them if the Commission approves much longer periods.

Consistent with the practice in some states, TWC proposes that the Commission adopt a more abbreviated timeline, which incorporates measures that allow for compressing the make-ready schedule further in routine cases. ^{76/} On the basis of its own experience, TWC believes that in most cases, make-ready can easily be done within 45 days. ^{77/} The Commission could apply this general timeline in typical cases where a communications service provider seeks to attach to between 20 and 200 poles. For applications involving even fewer poles, the make-ready process can be curtailed further. TWC proposes that make-ready work for fewer than 20 poles should be complete in 30 days. By contrast, to the extent that a provider seeks to attach to a much larger number of poles, the Commission could allow for a longer timeline. The Commission could impose a flexible deadline of between 60 to 90 days for completion of the make-ready process on applications involving more than 200 poles.

^{74/} Shugarman Decl. ¶ 5.

^{75/} Morrissey Decl. ¶ 7.

^{76/} See FNPRM ¶ 148; see also *Re The State's Pub. Serv. Co. Util. Pole Make-Ready Procedures – Phase I*, Docket No. 07-02-13, at 18 (CT Dept. of Pub. Util. Control, Apr. 30, 2008).

^{77/} Shugarman Decl. ¶ 9; Morrissey Decl. ¶ 8.

To the extent that certain applications affect poles that will pose problems in the permitting process because of pre-existing serious violations, the need for coordination among multiple attachers, or other reasons, timelines for these applications can and should be separately negotiated on a case-by-case basis. ^{78/} Unusually complicated circumstances should not hold up the make-ready process for other poles in an attacher's application. Problem poles should not be included in the Commission's computation of an "average" time that a utility has to make poles ready for attachments in any given application, because this will add unnecessary time to the completion of make-ready for the ordinary situations. Accordingly, the Commission should allow utilities to exclude such poles from the abbreviated deadlines proposed above.

B. The Make-Ready Timeline Can Be Compressed Substantially By Curtailing Unnecessarily Long Evaluation Periods And Allowing Attachers Additional Flexibility To Commence Construction.

The Commission's proposed five-stage timeline also overestimates the time a utility needs for certain stages in the process. For example, in Stage 1, the Commission provides a pole owner 45 days to evaluate an application and then in Stage 2, gives the utility another 14 days to prepare an estimate of costs after completing the survey. ^{79/} This fails to take into account the fact that most pole owners require the attaching party to do the engineering survey work and submit it with the pole attachment application. ^{80/} Consequently, a pole owner generally does not need additional time built into the schedule to allow it to perform a separate engineering survey because no such survey is required. ^{81/} This is particularly true in cases where both parties are using the same engineering contractors to complete the analysis.

^{78/} Non-serious violations should not delay attachment. The NESC provides that such violations are to be recorded and corrected as part of a normal maintenance schedule. *See* NESC Rule 214A4-5 (2007).

^{79/} FNPRM at ¶¶ 35-38.

^{80/} Shugarman Decl. ¶ 7-8.

^{81/} *Id.*

To the extent that an abbreviated process is adopted along the lines proposed here, TWC would not object to greater up-front requirements in the application process to provide engineering surveys, or to use utility-approved contractors to conduct the survey. Likewise, TWC would not object if the Commission allowed pole owners either to reject applications that supplied insufficient engineering surveys, or allowed additional time for cases that legitimately require additional substantive review by the pole owner.

The Commission also can and should compress the make-ready process further and expedite pole access by allowing communications service providers to begin certain construction work once payment is made. Attaching parties should be able to begin construction, using cross-arms, if necessary, to provide for adequate horizontal spacing until make-ready is complete. ^{82/} Boxing and bracketing can be useful in allowing temporary construction to proceed simultaneously alongside the permitting and make-ready process. Utilities have relied on these techniques for their own construction for decades.

Moreover, some items that currently hold up the permitting process can be addressed post-installation. For example, in cases where new attachments or overloading give rise to minor Code violations, such violations can be cured post-installation. ^{83/} Also, to the extent that a pole may need to be replaced, the replacement can take place after certain facilities are attached by using temporary construction techniques. Finally, the Commission can expedite access to poles by requiring pole owners to make certain pole ownership information available and more accessible to attaching entities. TWC has found regional electronic data systems such as NJUNS to be a useful tool for pole-related recordkeeping and notifications.

^{82/} Morrissey Decl. ¶ 7.

^{83/} See NESC Rule 214A4 (2007).

C. Non-Serious Code Violations Should Not Delay Broadband Deployment.

One persistent source of delay in the make-ready process is disputes concerning safety violations that existed on the pole prior to the installation of a new attachment. The Commission recognizes that this can occur in instances where the existing attachments were installed before safety code revisions were adopted, or where the utility was unaware of pre-existing violations until the make-ready for the new attachment is performed. 84/ While attachers must correct violations that they have created, TWC has found that many violations are created by the pole owner or by other attachers, who have modified their facilities or installed new facilities too close to TWC's attachment. 85/ Disputes over which party is responsible for curing the violations often needlessly delays the make-ready process. Violations that are not expected to endanger life or property can be noted and corrected once responsibility has been determined and should not derail the make-ready process. 86/

D. The Commission Should Allow Wider Use Of Outside Contractors To Eliminate Unnecessary Permitting Steps And Expenses.

TWC supports the expanded use of utility-approved outside contractors to the extent that this will accelerate the make-ready process and ensure consistency and reliability. In particular, TWC supports the Commission's proposal to allow attachers to use contractors to perform surveys and make-ready work where the utility has failed to meet its make-ready deadlines, or where the utility has agreed to allow attachers to do so. 87/

84/ See FNPRM ¶ 54.

85/ See generally Declaration of Donald E. Hooper, Attachment to Letter from Gardner F. Gillespie to Marlene H. Dortch, Secretary, Federal Communications Commission, submitted in WC Docket No. 07-245 (Jun. 24, 2008) (discussing dispute between TWC and Oncor Electric Delivery concerning prior NESC violations and disputes between attaching entities) ("*2008 Hooper Declaration*").

86/ See NESC Rule 214A4 (2007).

87/ See FNPRM ¶ 60.

In addition to expanding the use of outside contractors in the make-ready process, the Commission should implement rules that eliminate unnecessary steps and expenses. For example, pole owners should not be allowed to require that a professional engineer conduct a post-construction inspection if the attaching party is already using a utility-approved contractor for construction. The Commission also should consider requiring utilities to retain inspection and survey information on each pole and to make such information available to attachers. This would ensure that attachers are not charged repeatedly for collecting the same information on any given pole. These proposals would eliminate unnecessary expense and would be consistent with the Broadband Plan's recommendations and the Commission's goals in this proceeding.

E. The Commission Should Allow Communications Workers To Follow The NESC Work Rules.

The Commission proposes to limit communications attachers and their contractors "to the communications space and safety space below the electric space on a pole." ^{88/} This proposal is overly-restrictive. The NESC Work Rules contain detailed rules and specific approach distances for energized facilities on joint-use poles. ^{89/} Because the NESC Work Rules would allow communications workers to perform work that the Commission's proposed rule would not, the Commission's rule, if adopted, would inappropriately allow utilities to deny contractors access to perform work that the NESC states they can perform safely. In turn, this would delay and increase the costs of construction because certain work could only be performed by the utility's workforce when available. That result conflicts with the Broadband Plan's mandate to remove unnecessary delay and expense in the make-ready process. ^{90/} The Commission should not

^{88/} See FNPRM ¶ 69.

^{89/} See NESC Rule 432 & Table 431-1; see also 2008 Hooper Declaration at ¶ 6.

^{90/} See Broadband Plan at 111 (recognizing make-ready process is a "significant source of cost and delay in building broadband networks").

artificially limit the work that communications workers can perform, but instead allow them to perform work consistent with the NESC Work Rules.

III. THE COMMISSION’S PROPOSED MODIFICATIONS TO THE “SIGN AND SUE” RULE ARE COUNTERPRODUCTIVE AND SHOULD BE ABANDONED.

TWC fully supports the Commission’s conclusion that the “sign and sue” rule remains an important check on utility abuses of their superior bargaining power in pole attachment contract negotiations. 91/ The Commission’s proposal to modify the rule, however, to require “an attacher to provide a utility with objections to a provision in a proposed pole attachment agreement, during contract negotiations, as a prerequisite for later bringing a complaint challenging that provision” is misguided and should be rejected. 92/ The “sign and sue” rule works and is not in need of refinement.

The record demonstrates that the “sign and sue” rule encourages utilities to negotiate in good faith and curbs monopoly abuses at the bargaining table. 93/ The apparent premise of the Commission’s proposed modification to the rule – *i.e.*, that attachers should not be allowed to “cherry pick” terms and conditions – is not supported by the record in this proceeding and is flawed. The Commission seems to assume that attachers and utilities bargain over lawful terms and conditions of attachment. But utilities often present attachers with one-sided boilerplate agreements that contain numerous provisions that are inconsistent with Commission requirements. Then, relying on their superior bargaining power, they have little or no incentive to (and often do not) make any concessions other than deleting facially illegal terms. That is

91/ See FNPRM ¶ 99.

92/ See FNPRM ¶ 107.

93/ See NCTA Comments at 23; Comments of Comcast at 42-43; TWC Reply Comments at 60.

why this Commission has consistently acknowledged that pole attachment terms and conditions cannot be deemed reasonable simply because they have been accepted by an attacher. ^{94/}

Accordingly, while parties on equal footing may engage in *quid pro quo* negotiations over generally reasonable terms, attachers do not enjoy the ability to negotiate a fair “bargained-for package of provisions” with utilities that they should have to live with. ^{95/} The Commission should not require attachers to accept unreasonable terms and conditions of attachment simply because they were able to convince the utility to give up some unlawful terms.

In light of the plain realities of pole attachment negotiations, the Commission’s proposal would undermine its ability to police the reasonableness of pole attachment terms and conditions. The Commission has long recognized that attachers cannot bargain away their statutory rights under Section 224. ^{96/} Yet, a rule that required attachers to accept unreasonable terms that they agreed to as part of a “bargained-for exchange,” and would prevent attachers from challenging provisions in existing pole attachment agreements where negotiations had occurred, essentially requires attachers to sacrifice their statutory rights. By requiring attachers to accept such terms and conditions, the Commission would also inappropriately circumscribe its mandatory statutory responsibility broadly to regulate any unjust and unreasonable pole attachment rates, terms and

^{94/} See *Selkirk Comm., Inc. v. Florida Power & Light*, 8 F.C.C.R. 387, 389 ¶ 17 (1993) (“Due to the inherently superior bargaining position of the utility over the cable operator in negotiating the rates, terms and conditions for pole attachments, pole attachment rates cannot be held reasonable simply because they have been agreed to by a cable company.”); *Heritage*, 6 F.C.C.R. at 7105, ¶ 31 (acknowledging “superior bargaining position utilities typically enjoy over cable operators in negotiating the rates, terms and conditions for pole attachments”).

^{95/} See FNPRM ¶ 106.

^{96/} See *Cable Servs. Bureau Releases Letter Regarding Util. Pole Attachment Issues*, Report No. CS 97-4, 1997 WL 18030 (Jan. 21, 1997) (holding that “a utility demanding a clause in a pole attachment contract that requires the attaching telecommunications provider to waive any and all statutory rights to complain to the Commission or any state or other authority with respect to the rates, terms or conditions of the contract . . . would be a *per se* violation of Section 224’s requirement to negotiate in good faith and that it is contrary to Section 224 for a party to be pressured, as a condition of a contract, to waive its legal rights and remedies”).

conditions. ^{97/} But the Commission has long recognized that altering abusive pole attachment contract terms is a cornerstone of effective enforcement of Section 224. ^{98/}

The Commission's proposed modification of the rule is also unworkable. The Commission presupposes that an attacher would be able to identify with precision all unreasonable terms during negotiations. ^{99/} Given the consequences of failing to identify any such terms, however, attachers would be forced to err on the side of over inclusion for fear of being denied the ability to challenge an unreasonable term in the future. The Commission's proposed exception for terms and conditions that are unreasonable "as applied" does not fix the problem. Because the Commission's proposed exception is not self-executing, attachers would have to guess at which terms are unreasonable "on their face" and which could be unreasonably applied. The uncertainty of that task would necessarily lead to over inclusion.

The upshot of the Commission's proposed process is obvious and untoward: It would delay timely access to critical pole infrastructure. Pole attachment negotiations are already a lengthy, time-consuming, and costly endeavor. Requiring attachers to identify any conceivable unreasonable terms during the course of negotiations would only complicate and prolong the process. The Commission's proposed rule (and exception) would also encourage more litigation before the Commission, because attachers would be required to litigate over terms that may never be enforced by a utility. The additional delays and litigation engendered by the Commission's proposed rule contravenes one of the fundamental mandates of the Broadband

^{97/} See 47 U.S.C. § 224(b)(1) ("[T]he Commission *shall* regulate the rates, terms and conditions for pole attachments to provide that such rates, terms and conditions are just and reasonable.") (emphasis added).

^{98/} See *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585, 1590, ¶ 16 (1978) ("Without authority to alter unreasonable or unjust contractual rates, terms or conditions, the Commission would be powerless to act in accordance with its mandate. We believe Section 224 is clear in giving the Commission such authority.").

^{99/} See FNPRM ¶ 108.

Plan: to reduce the costs that service providers incur to access infrastructure necessary to deploy broadband facilities. 100/ The Commission should not modify the “sign and sue” rule.

IV. ALLOWING DAMAGES FOR POLE ATTACHMENT ABUSES IS ENTIRELY APPROPRIATE, WILL REDUCE DISPUTES AND FURTHER THE GOAL OF UNIVERSAL BROADBAND DEPLOYMENT.

TWC strongly supports the Commission’s proposal to allow attachers to recover compensatory damages for unlawful delays or denials of access and for unjust and unreasonable pole attachment rates, terms and conditions. 101/ TWC also strongly supports the Commission’s proposal to measure damages consistent with the applicable statute of limitations rather than from when a complaint is filed. 102/

The Commission is vested with broad authority under Section 224 to take actions that it “deems appropriate and necessary” to enforce “any determinations resulting from complaint procedures.” 103/ Permitting an award of compensatory damages for unjust and unreasonable rates, terms and conditions is fully consistent with the sound exercise of that statutory responsibility, 104/ consistent with Commission precedent, 105/ and, frankly, long overdue.

The Commission is entirely correct that utilities currently have little incentive to comply with the Commission’s rules, particularly its access requirements, before a complaint is filed, and they often do not. 106/ TWC frequently encounters situations where utilities simply refuse to abide by established Commission precedent. For example, one investor-owned utility in New

100/ See Broadband Plan at 109 (“The costs of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands.”).

101/ See FNPRM ¶¶ 86-87.

102/ See *id.* ¶ 88.

103/ 47 U.S.C. § 224(b)(1).

104/ See *id.* § 224(b)(1); FNPRM ¶ 84; see also 47 C.F.R. § 1.145 (“Commission may issue such other orders . . . as will best conduce to . . . the ends of justice.”).

105/ See *Knology, Inc. v. Georgia Power Co.*, 18 F.C.C.R. 24,615, 24,640, ¶¶ 54-57 (2003); *Cable Tex., Inc. v. Entergy Serv., Inc.*, 14 F.C.C.R. 6647, 6653, ¶¶ 18-19 (Cable Serv. Bur. 1999).

106/ See FNPRM ¶ 86.

Mexico recently refused to allow TWC to overlash its own facilities without complying with its permitting process, notwithstanding the Commission's clear precedent that overlashing is not subject to advance permitting requirements. 107/ While this situation was ultimately resolved informally, the utility's refusal to honor the Commission's rules caused TWC to suffer substantial delays in constructing facilities necessary to serve a commercial customer. 108/ This is just one of many instances where TWC has had significant construction projects held up by utilities insisting on procedures that clearly violate established Commission rules. 109/

The prospect of compensatory damages for delays and denials of pole access, as well as for unjust and unreasonable terms and conditions, will provide utilities with a strong incentive to comply with established Commission requirements before the attacher undertakes the time and expense of filing a complaint. This will likely have the salutary effect of reducing the time and expense attachers spend on disputes with utilities – such as the one noted above – over settled Commission requirements. The elimination of such needless disputes also advances the Broadband Plan's objective to “expedite dispute resolution,” which, in turn, “would serve the overarching goal of lowering costs and promoting rapid broadband deployment.” 110/

By the same token, the Commission's existing remedies do not make attachers whole for violations of Section 224, or encourage utilities to act reasonably. For instance, the most that TWC could have achieved through a pole attachment complaint in the example discussed above would have been a ruling from the Commission that the utility's requirements were unlawful. While that ruling would have at least definitively cleared the way for TWC to access the poles, it would have done nothing to compensate TWC for the delays and disruption of its business, as

107/ See Shugarman Decl. ¶¶ 12-14.

108/ See Shugarman Decl. ¶ 13.

109/ See Shugarman Decl. ¶¶ 12-14.

110/ Broadband Plan at 112.

well as harms to its reputation and good will, that the utility's unreasonable demands caused. Nor would such a remedy provide any incentive for the utility to comply with Commission rules before being expressly directed to do so. As the Commission recognizes, an award of compensatory damages would both make the attacher whole for the harms that a utility's abuses caused and would deter such abuses in the first place. 111/

TWC also supports the Commission's proposal to allow damages to run consistent with the applicable statute of limitations, rather than from the date a complaint is filed. This will facilitate informal dispute resolution and reduce litigation before the Commission, because attachers will not be compelled immediately to file a complaint in order to preserve their damages claims. It will also ensure that a damages award makes an attacher whole. The current rule insulates unjust rates that a utility was able to collect from an attacher prior to the filing of a complaint, and, in light of the Commission's other proposed rule changes, would prevent an attacher from recovering for injuries suffered prior to the filing of a complaint.

V. THE COMMISSION SHOULD REAFFIRM THAT CABLE OPERATORS MAY OVERLASH EXISTING ATTACHMENTS WITHOUT ADVANCE NOTICE OR APPROVAL.

The Commission has repeatedly held that a cable operator does not need to provide a utility with advance notice or obtain approval prior to overlashing a host attachment. 112/ This rule "promotes competition" and "minimizes installing and financing infrastructure

111/ See FNPRM ¶ 86 ("Allowing an award of compensatory damages for unlawful delays or denials of access would provide an important disincentive to pole owners to obstruct access. It would also give the Commission the ability to ensure that the attacher is 'made whole' for the delay it has suffered.").

112/ See *Amendment of Commission's Rules Governing Pole Attachments*, 16 F.C.C.R. at 12,141, ¶ 75 ("We affirm our policy that neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment."); see also *Common Carrier Bureau Cautions Owners of Util. Poles*, Public Notice, DA 95-35 (Jan. 11, 1995) (warning pole owners against imposing restrictions of cable operators seeking to overlash their own attachments).

facilities.” 113/ Despite the Commission’s clear rule and the sound policy rationale informing it, the issue of advance notice for overlashing remains a contentious point. The Commission itself continues to be called on to resolve disputes over unreasonable restrictions on overlashing. 114/

In TWC’s experience, the issue continues to be a problem as well. TWC continues to encounter utilities that refuse to acknowledge the Commission’s rule during negotiations over pole attachment agreement terms and conditions. TWC frequently receives draft pole attachment agreements from utilities that include provisions that subject overlashing to the same advance permitting requirements that apply to hard line attachments. As a result, TWC is forced to expend significant resources negotiating over an issue that the Commission has long-since settled.

Furthermore, TWC has been involved in numerous disputes where utilities have held up construction projects for long periods of time by insisting that TWC comply with inappropriate requirements before overlashing its existing attachments with light-weight fiber optic cable. 115/ In some cases, utilities have demanded that TWC’s overlashing comply with their full permitting process or that a professional engineer sign off on TWC’s construction prior to overlashing, even though TWC provides the utility with pole loading information prior to overlashing that demonstrates that the overlashing will have no material impact on pole loading. 116/ These disputes are costly and cause profound delays that prevent TWC from timely serving commercial customers, including anchor institutions and wireless providers. 117/

113/ See *1998 Report & Order*, 13 F.C.C.R. at 6807, ¶ 62 (“We believe overlashing is important to implementing the 1996 Act as it facilitates and expedites installing infrastructure essential to providing cable and telecommunications services to American communities. Overlashing promotes competition by accommodating additional telecommunications providers and minimizes installing and financing infrastructure facilities.”).

114/ See *Salsgiver Communications, Inc. v. North Pittsburgh Tel. Co.*, 22 F.C.C.R. 20,536, 20,541, ¶ 17 (2007) (“[W]e find this blanket limitation to be unreasonable on its face.”).

115/ See Shugarman Decl. ¶¶ 12-14.

116/ See Shugarman Decl. ¶ 13.

117/ See Shugarman Decl. ¶¶ 13-14.

Reminding utilities that cable operators are not required to provide advance notice prior to overloading an existing attachment would hopefully put this issue to bed once and for all – saving attachers and the Commission from having to continue to spend time and energy on a settled issue. 118/ Reaffirming this rule is also consistent with the Broadband Plan’s mandate to “expedit[e] processes and decreas[e] the risks and complexities that companies face as they deploy broadband network infrastructure.” 119/

VI. THE COMMISSION SHOULD NOT ADOPT MORE SEVERE PENALTIES FOR UNAUTHORIZED ATTACHMENTS.

Although the Commission recognizes that it is difficult to gauge the scope of the problem with unauthorized attachments, it asks whether it should adopt more severe penalties to deter them based on rules instituted by the Oregon Public Utilities Commission (“Oregon PUC”). 120/ The answer is no. Far from supporting the notion that attachers are driven to ignore utility permitting procedures by competitive pressures, the record established during earlier rounds of this proceeding amply demonstrates that utility claims of massive unauthorized attachments in the field are overblown and misleading. 121/ Under such circumstances, the Commission’s proposal is a solution in search of a problem: The penalties that the Commission has already approved – up to a maximum of five times the annual pole rent, plus interest – are serious and sufficient to deter cable operators from making unauthorized attachments. 122/

As TWC has previously explained in this proceeding, the real issue is not the size of the penalty that is sufficient to deter cable operators from making unauthorized attachments to utility

118/ See *Amendment of Commission’s Rules Governing Pole Attachments*, 16 F.C.C.R. at 12,141, ¶ 75.

119/ Broadband Plan at 110.

120/ See FNPRM ¶ 96.

121/ See Comments of Knology at 15; Reply Comments of Comcast at 25-26.

122/ See FNPRM ¶ 94; *Mile Hi Cable Partners L.P. v. Public Serv. Co. of Colo.*, 15 F.C.C.R. 11,450, 11,458, ¶ 14 (Cable Serv. Bur. 2000), *aff’d on review*, 17 F.C.C.R. 6268 (2002), *review denied sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

poles, but is instead the manner in which utilities determine the existence of unauthorized attachments. ^{123/} Under the best of circumstances, attachment audits are far from a precise and foolproof science, but, in TWC's experience, utilities' audits are frequently riddled with methodological and implementation errors that render their findings unreliable. Thus, utilities' accusations of large numbers of unauthorized attachments are typically the by-product of errors in the way that a utility's system audit is designed or carried out and are hotly disputed by the cable operator. Utility audits are typically not even designed to determine the number of attachments for which the cable operator has not obtained a permit. Instead, the utility simply compares the number of attachments that its contractors counted in the field against the number of attachments for which it is billing the cable operator and, if any greater number of attachments are counted in the field, the overage is deemed "unauthorized" without verifying whether the cable operator obtained permits for any given attachment.

There are numerous simple errors that lead to attachments being deemed "unauthorized." In some cases, the outside contractors that typically perform system audits for utilities are not provided with detailed system maps, which leads them to impute attachments made by others to the cable operator, or even count as "unauthorized" attachments to poles that are owned by another utility. Changes in pole ownership can also result in attachments being deemed unauthorized during the course of an audit. That is, a cable operator's *authorized* attachment on a pole that was once owned by the telephone company to whom it had been paying pole rent for years becomes an *unauthorized* attachment when ownership of the pole changes to the electric utility because the electric utility has no record of the cable operator's permit. Additionally, when a utility adds poles to an existing line, attachments to those poles can be deemed

^{123/} See TWC Reply Comments at 47-49; *see also* TWC Comments at 54-56.

unauthorized, even though the poles were added without notice to the cable operator and all of its other attachments in that run were properly permitted.

Even more significantly, utility audits also generate large numbers of “unauthorized” attachments when the utility instructs its contractors to deploy new ways of counting attachments that deviate from the parties’ historic practice and contract requirements. For example, some utilities have inflated the number of unauthorized attachments by counting for the first time multiple attachments on a pole, hardware such as “J-hooks” within the cable operator’s assigned foot of space, or attachments to “drop” or “lift” poles.

From its own experience, TWC is painfully aware of these utility errors that inappropriately inflate “unauthorized” attachment numbers. For example, after completing an audit of 20,000 TWC attachments in the Houston, Texas area, an investor-owned utility alleged that nearly half were unauthorized. But upon its own inspection, TWC determined that the audit results were massively incorrect and the utility subsequently substantially reduced the number of unauthorized attachments it claimed. The errors that TWC uncovered included numerous mistakes by the outside contractor, including counting attachments that did not belong to TWC as “unauthorized,” counting as “unauthorized” attachments to poles that could not be located in the field or to which TWC was not even attached, and double-counting TWC’s attachments. Many of the “unauthorized” attachments were also drop poles for which permits were not historically required and which had not even been previously counted for billing purposes. Still other “unauthorized” attachments were to “mid span” poles that were added to existing pole runs without TWC’s knowledge and long after its distribution network had been constructed.

Another audit conducted of TWC’s facilities by an Ohio investor-owned utility was riddled with troubling errors that produced a similarly inflated number of “unauthorized”

attachments. Even though the utility had conducted an audit a few years earlier in which it did not identify *any* unauthorized attachments, the utility found more than 2,000 “unauthorized” attachments after surveying 20 percent of TWC’s attachments (approximately 15,000 attachments) and sought to collect 26 years of penalties for them. Once again, through its own investigation, TWC determined that the audit was unreliable. TWC concluded that 30 percent of the attachments deemed “unauthorized” were properly permitted, owned by another provider or did not exist, or were on poles owned by another utility. An additional 18 percent of the “unauthorized” attachments were instances where the utility asserted that TWC’s attachments occupied more than one foot of space, such as where there was a riser or power supply on the pole in addition to a fiber cable or where TWC’s attachment was more than one foot above the telephone company’s wire. The utility, however, had no right to charge for such multiple attachments. Another 16 percent of TWC’s attachments deemed “unauthorized” were service drop attachments to subscribers’ homes, which the utility had never required TWC to permit. In total, then, 64 percent of “unauthorized” attachments were mislabeled as such. These troubling examples are representative of problems that TWC has experienced in other service areas as well.

Furthermore, as TWC has previously noted in this proceeding, utility claims of “unauthorized” attachments are further aggravated by the unavailability, in many cases, of complete and accurate pole permit records. ^{124/} In some cases, TWC may not have complete permit records because such records were not provided by the prior owner of the cable system. Yet, in other cases, utilities’ records are inaccurate or incomplete, such as where the utility did not historically require permits to be obtained for drop attachments.

In light of the errors that produce large numbers of “unauthorized” attachments, approving more severe penalties would not promote the Commission’s goal of deterring non-

^{124/} See TWC Comments at 55.

compliance with permitting procedures and would create perverse incentives for utilities. Instead of performing audits that are actually designed to identify attachments made without a permit, utilities would have a financial motive to perform audits that do not take account of any of the problems noted above. The fact that utilities frequently pay their contractors based on the number of attachments that they find would only make this situation worse.

If the Commission nevertheless determines to impose stricter penalties for unauthorized attachments, it should follow the approach adopted by the New York Public Service Commission (“New York PSC”), rather than the approach adopted by the Oregon PUC. ^{125/} Under the New York PSC’s Policy Statement on Pole Attachments, pole owners and attachers are required to establish a common baseline of attachments by stipulating based on current records or through a joint audit conducted at each party’s own expense. ^{126/} After the parties have established a common baseline, unauthorized attachments are subject to a penalty of three times the pole rental per attachment back to the date when the baseline was established. ^{127/}

The approach adopted by the NY PSC makes good sense because, as it recognized, both utilities and attachers “have some inaccuracies in their records of what attachments are on the poles.” ^{128/} Thus, because neither utility nor attacher pole attachment records could serve as the basis of an appropriate baseline, “a stipulation or audit is necessary in order to reach a starting point for the future tracking of audits.” ^{129/} And the NY PSC determined that it is not fair or

^{125/} See *Re Commission Concerning Pole Attachment Issues*, Case 03-M-0432, 2004 WL 1764132 (N.Y.P.S.C. Aug. 6, 2004) (Policy Statement on Pole Attachments).

^{126/} See *id.* at *4 & *11.

^{127/} See *id.* at *4 & *11.

^{128/} *Id.* at *4.

^{129/} *Id.*

appropriate to impose penalties for unauthorized attachments until after the utility and attacher agree upon a proper baseline. ^{130/}

If the Commission decides that more severe penalties are necessary to deter unauthorized attachments, it should provide that no such penalties can be imposed unless and until the attacher and the utility have established a common attachment baseline, either through a joint audit or agreement based on their existing attachment records. It should also require utilities to provide cable operators with their pole attachment records going forward. This approach would promote compliance with permitting procedures, provide a common basis for determining unauthorized attachments, and reduce contentious disputes over claims of unauthorized attachments.

In line with the NY PSC's conclusion that attachment records are often inaccurate, the Commission should also conclude that a utility may not impose unauthorized attachment penalties based on an apparent disparity between the number of attachments that it has on record and the number of attachments counted in the field by its auditors. ^{131/} Utility efforts to impose penalties under such circumstances cannot be verified, are unfair, and inevitably lead to costly and distracting disputes that are a drag on facilities deployment. By the same token, a utility should only be allowed to impose penalties for unauthorized attachments based on the results of an audit that is actually designed to determine whether given pole attachments are authorized. Thus, before a utility may impose any penalty for an unauthorized attachment, the utility should be required to establish that it owned the pole during the period for which it seeks to penalize the cable operator and that the cable operator did not obtain a permit to attach to it.

Finally, any penalties that the Commission adopts for unauthorized attachments should not apply to drop attachments. Attachments to drop poles are not subject to the same advance

^{130/} *See id.*

^{131/} *See id.* at *4.

permitting requirements as hard line attachments and do not pose the same kinds of weight or safety considerations as hard line attachments, 132/ and thus unauthorized drop attachments should be subject to less severe penalties.

CONCLUSION

TWC agrees that the Commission should implement a low and uniform rate structure for attachments. The Commission's approach is permissible and will advance the core objective of promoting broadband deployment. While TWC agrees that the Commission can and should remove inappropriate costs from the Telecom Rate, it also encourages the Commission to set the Cable Rate as the upper bound for telecommunications services attachments. That approach finds support in Section 224's text, structure and history.

While TWC supports the Commission's effort to reduce the costs and delays of the permitting process, it should not adopt its proposed multi-stage permitting and make-ready timelines. The Commission's proposal may address the most egregious delays, but it would introduce new and destructive delays into the process for typical construction projects. If the Commission decides to set timetables, it should adopt far shorter ones that are more in line with standard contract requirements and TWC's current experience. It should also facilitate a more efficient make-ready process by adopting rules that allow wider use of outside contractors, prevent non-serious safety violations from derailing construction, and that allow communications workers to follow the NESC work rules. And it should reaffirm that cable operators are not required to give notice or obtain advance permission before overlying a host attachment.

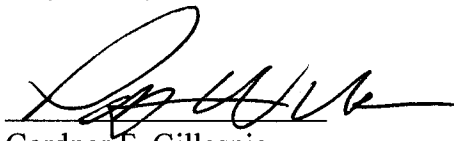
The Commission should adopt some, but not all of its proposals related to its enforcement authority. The Commission should permit attachers to recover compensatory damages for access

132/ See, e.g., *Salsgiver Communications, Inc. v. North Pittsburgh Tel. Co.*, 22 F.C.C.R. 20,536, 20,543-44, ¶¶ 24-25 (2007); *Mile Hi Cable Partners*, 15 F.C.C.R. at 11460, ¶ 19.

denials and unreasonable rates, terms and conditions consistent with applicable statutes of limitations. The specter of damages will encourage utilities to comply with the Commission's rules before a complaint is filed, and the availability of damages will make attachers whole for utility abuses. The Commission should not, however, modify the "sign and sue" rule. The Commission's proposed modifications are unworkable, would undermine the Commission's ability to enforce Section 224, further complicate and prolong negotiations of pole attachment agreements, and encourage more litigation over potentially unreasonable terms.

Finally, the Commission should not adopt stiffer penalties for unauthorized attachments. Utilities' claims of unauthorized attachments are overblown, and the existing penalties are adequate to deter cable operators from failing to comply with permitting procedures. If the Commission nevertheless decides that more severe penalties are in order, it should require utilities and attachers to establish a common baseline before any penalties may be imposed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul A. Werner", is written over a horizontal line.

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Counsel for Time Warner Cable Inc.

August 16, 2010

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
Implementation of Section 224 of the Act;)	WC Docket No. 07-245
A National Broadband Plan for Our Future)	
)	GN Docket No. 09-51
)	

**DECLARATION OF BRUCE A. MORRISSEY
TIME WARNER CABLE**

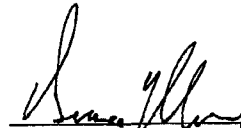
1. I, Bruce A. Morrissey, hereby declare the following to be true:
2. I am the Director of Engineering, for Time Warner Cable ("TWC") in the Wisconsin Division.
3. I have been employed in the cable industry since 1980 in positions overseeing the construction and maintenance of cable plant. I became the Chief Engineer for TWC in Wisconsin in 1991, and was responsible for all aspects of engineering for the company. I have been involved in the negotiation and implementation of various pole attachment agreements since 1980. I have held my current position of Director of Engineering since 2007.
4. In my current position, I manage all plant design and construction for the company, negotiate utility pole attachment agreements in Wisconsin, and interface with TWC business units.
5. **Make-Ready.** TWC's business unit offers business-class fiber-optic services with an installation commitment of 60-days. This 60-day commitment means that when the business unit signs a new customer, the entire make-ready process must be complete well within that

timeframe. TWC's average installation times in the Wisconsin Division are 50-55 days from application to complete installation. Even in difficult cases where new poles must be installed, the make-ready timeframe is less than 60 days.

6. A 105/149-day make-ready period like the one proposed by the Federal Communications Commission ("FCC") would more than double the amount of time TWC currently takes to provide service to a new customer. Such a timeline would effectively prevent TWC from offering its 60-day commitment and would be devastating for TWC's fiber-based services, as the telephone companies in the region are able to offer a 60-day installation commitment for their services.
7. In the Wisconsin Division, some pole owners regularly complete the make-ready process from application to installation within 50 days. Other pole owners allow TWC to begin construction upon receipt of its payment approving make-ready charges, allowing TWC to build while the pole owner completes make-ready work, so that installation times are the same, even though the pole owner's make-ready work may take additional time. These operational parameters are not formalized in TWC's existing contracts and are not contractual guarantees, but are practices that have been informally adopted over the years by the parties through good working relationships among field personnel. Providing pole owners with a 105/149-day timeline to complete the make-ready process could undermine their current initiatives to approve and allow prompt installation.
8. Based on the average installation times in the Wisconsin region, we believe that the make-ready timeline should be 45 days, and in no case should be as long as the 105/149 days the FCC is proposing. Further, we believe that the Commission should encourage the practice of allowing a cable operator to build-through the make-ready process. For example, to the

extent that there are spacing issues on a pole, cable operators should be allowed to commence temporary construction using cross-arms. This would address safety concerns and allow for faster build-outs.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Bruce A. Morrissey
Director of Engineering
Time Warner Cable, Wisconsin Division

Dated: August 16, 2010

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
Implementation of Section 224 of the Act;)	WC Docket No. 07-245
A National Broadband Plan for Our Future)	
)	GN Docket No. 09-51
)	

**DECLARATION OF ROBERT SHUGARMAN
TIME WARNER CABLE**

1. I, Robert Shugarman, hereby declare the following to be true:
2. I am Vice President, Construction and Design, for Time Warner Cable ("TWC") in Texas.
3. I have been employed in various technical and management positions in the cable industry since 1985 and since 1989 I have been involved primarily in various aspects of cable and telecommunications network design and construction. I have been involved in pole attachment agreement negotiations and implementation since 1994. I began working for TWC in 2003 as System Director of Engineering in Beaumont, Texas, and in 2006 was promoted to Division Vice President of Engineering. I have held my current position of Vice President of Construction and Design since 2008.
4. In my current position, I manage all outside plant design and construction, negotiate utility pole attachment agreements in Texas, and oversee the verification and payment of pole attachment rental invoices.
5. **Make-Ready.** Currently, Time Warner Cable has approximately 80 pole attachment agreements with investor-owned utilities and telephone companies in Texas. The majority of

the pole attachment agreements that TWC has recently entered with pole owners specify that make-ready work must be completed, and TWC must be allowed to attach new facilities to poles, within 90 days.

6. In practice, make-ready work is generally completed in far less time. In some rare instances, projects may take longer where the make-ready work involves the coordination among multiple attached parties, using different sets of workers. In our experience, the make-ready process is much faster and more efficient when the parties use the same contractor to perform work.
7. TWC's contracts with pole owners generally require TWC to do the engineering survey work and submit it with the pole attachment application. In order to attach to new poles, TWC is obligated to conduct field inspections, perform engineering work, and submit permit applications to the pole-owning utilities. Once an application is processed by the pole owner, it performs its own inspection and engineering work, and produces a bill of material estimate for "make ready" work. The pole owner's subsequent engineering work largely duplicates information submitted by TWC in the permit application process.
8. Once the pole owner approves a permit and TWC agrees to the make-ready estimate, it takes additional time for the pole owner and attaching entities to complete the make-ready work and hand-off back to TWC for construction. In most cases, TWC is ready to construct as soon as make-ready has been inspected and the permit is released. The permitting and make-ready process timeline is a significant variable within the TWC's time-to-market timeline.
9. TWC has compiled information concerning time-frames for make-ready, involving a number of different pole owners in our North Texas region. According to this information, the average time for complete installations, from time of application to time of complete

installation, is 51 days. Because this is an average, it necessarily includes projects that took much shorter, as well as much longer. Based on this average, the permitting and make-ready process takes much less time than the 105/149 days the Federal Communications Commission (“FCC”) is proposing.

10. In TWC’s experience, its installation timetable is not generally upset by make-ready that requires a pole change-out. Pole change-outs are generally not time-consuming. At most, installing a new pole requires a few additional days. Even in the worst cases, poles are typically ready to accommodate a new attachment within 90 days.

11. The Commission’s proposed 105/149-day timeline would needlessly extend TWC’s build-out time dramatically, and would severely undermine TWC’s ability to compete with other service providers. For example, TWC’s business services unit markets its fiber-based services on the basis of a 60-day installation commitment. To begin providing service to a new customer within this time-frame, all make-ready work must be complete within 45-52 days from the date of TWC’s application. Providing new customers with service on a timely manner is a critical business objective for TWC. TWC simply cannot extend its installation commitment to accommodate a 105-day period for make-ready and still effectively compete against other providers.

12. **Overlashing.** Even though the FCC has said that cable operators do not need to obtain a pole owner’s advance permission before overlashing a host attachment, TWC has been involved in numerous disputes where utilities have insisted that TWC comply with inappropriate requirements before overlashing its own facilities.

13. For example, TWC had a major and time-sensitive construction project for a wireless provider in its North Texas region that involved overlashing fiber onto its existing

attachments that was delayed for a long period of time by a utility insisting that TWC comply with its permit process before TWC performed any overloading. Specifically, although it is TWC's practice to provide the utility with pole loading information showing that its planned overloading would not materially impact the poles before working on the poles, the utility insisted that a professional engineer sign off on TWC's construction prior to overloading. While this dispute was ultimately resolved, it required involvement of outside counsel and seriously delayed TWC's completion of the project. In fact, the delays caused by this dispute put TWC's ability to meet its contractual commitments in jeopardy.

14. TWC has faced other situations similar to this one, where a utility insists that TWC comply with its permitting process or obtain a professional engineer sign off before working on the poles. When they occur, these disputes create great uncertainty as to when a project can be completed, make the project more expensive, and can prevent TWC from meeting its contractual commitments to get services up and running.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Robert Shugartman
Vice President, Construction and Design
Time Warner Cable, Texas

Executed on August 16, 2010